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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ARMANDO HERNANDEZ,

Defendant and Appellant.

B285437

(Los Angeles County  
Super. Ct. No. MA070647)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen I. Goorvitch, Judge. Affirmed as modified and remanded.

Renee Rich, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Michael C. Keller, Acting Supervising Deputy Attorney General, Eric J. Kohm, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Armando Hernandez (defendant) of assault with a deadly weapon. The parties agree the trial court erred at sentencing by issuing a three-year post-conviction protective order, so we decide only two disputed issues: whether the trial court abused its discretion when it denied defendant's *Romero*<sup>1</sup> motion as to a 1997 assault with a firearm conviction that would subject him to a Three Strikes law indeterminate sentence, and whether a remand is in order due to a recent legislative change in sentencing law.

## I. BACKGROUND

### A. *The Offense Conduct and Trial*

At about 2:30 a.m. on August 9, 2016, while living with his aunt and her then 13-year old daughter S.S., defendant opened the door to S.S.'s bedroom and found S.S. on the bed with her 14-year old boyfriend, S.H. Defendant entered the bedroom and attacked S.H., grabbing him by the hair and punching him in the face with his fist. In response, S.S. yelled and kicked defendant until he left the room.

Once defendant left, S.S. told S.H. to go home. S.H. exited the house through the back door. As S.H. crossed the backyard, defendant approached and began hitting him with a baseball bat. According to S.H., S.S. and her mother intervened and held defendant back, which allowed S.H. to escape the backyard.

A few minutes later, as S.H. was walking along a street, defendant pulled up next to him in a car. Defendant got out of the car and again hit S.H. with the bat. S.S. and her mother then

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<sup>1</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

arrived on the scene in another vehicle, and defendant returned to his car and drove off.<sup>2</sup>

During the baseball bat beatings, S.H. believed that defendant was aiming the bat at his head. At no point did S.H. strike or try to strike defendant.

The Los Angeles County District Attorney charged defendant with one count of assault with a deadly weapon (Pen. Code,<sup>3</sup> § 245, subd. (a)(1)). The information against defendant alleged he sustained two prior serious or violent felony convictions, both of which were for assault with a firearm (§ 245, subd. (a)(2))—one in 1997 and one in 2008. A trial jury found defendant guilty of the charged assault with a deadly weapon offense and defendant separately admitted sustaining both alleged prior convictions.

### *B. Sentencing*

Prior to sentencing, defendant filed a *Romero* motion asking the trial court to strike one or both of his prior felony convictions for sentencing purposes.<sup>4</sup> Defendant maintained the

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<sup>2</sup> There were discrepancies in the testimony at trial as to whether defendant hit S.H. with the baseball bat on two occasions after S.H. left the backyard, or only once. We relate the facts focusing on the one occasion upon which the witnesses agreed.

<sup>3</sup> Undesignated statutory references that follow are to the Penal Code.

<sup>4</sup> Defendant's motion does not clearly state whether he was asking the court to strike both convictions or only the older conviction. The trial court interpreted the *Romero* motion in the

court should grant his *Romero* motion because he did not commit the assault against S.H. “randomly and out of the blue with no justification”; instead, he claimed he did it because he “believed that he was defending his cousin [S.S.] . . . against a rape.”<sup>5</sup>

Defendant acknowledged what he called his “checkered criminal past,” but he contended his age (40 years old at the time) and his efforts at turning his life around (among other things, he had recently obtained an Associate’s Degree from Antelope Valley College) placed him outside the spirit of the Three Strikes law.

The prosecutor opposed the defense *Romero* motion, placing special emphasis on two points: the quite serious circumstances of defendant’s prior felony convictions and defendant’s lengthy criminal history.

As to the former, the prosecution emphasized defendant’s 1997 conviction for assault with a firearm (which was not his first criminal conviction) involved a drive-by shooting in which defendant fired four to five rounds at a group of men, wounding one of them, and then, as the group was transporting the wounded man to the hospital, defendant followed and shot twice more at their vehicle. The 2008 conviction for assault with a firearm also involved a drive-by shooting, with defendant

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“most expansive way possible,” i.e., as a motion requesting it to strike both of the prior convictions.

<sup>5</sup> This was a claim defendant raised only at sentencing; he did not put on a defense case at trial. On appeal, defendant does not continue to advance the argument that he believed S.H. was going to rape S.S. Rather, he recedes to the position that he was a “surrogate parent” to S.S. and was very upset when he found S.H. in S.S.’s bedroom in the middle of the night.

shooting first at an unoccupied vehicle parked in front of the victims' house and then returning to the scene to shoot at the victims' house itself, producing shrapnel that wounded one of the house's inhabitants.

As to the latter point of emphasis (defendant's criminal history), the prosecution detailed defendant's consistent pattern of criminal behavior. After completing his five-year prison sentence for the 1997 drive-by shooting, but prior to being convicted of the 2008 drive-by shooting, defendant was convicted of three misdemeanor offenses and one infraction (variously including, among other things, domestic violence and reckless driving). Less than two years after being released from his seven-year sentence for the 2008 conviction, defendant engaged in the assault charged in this case. Furthermore, the prosecutor noted that at the time of defendant's conviction in this case, he had another criminal case pending. The prosecution contended defendant's criminal conduct was unseparated by a crime-free period of any substantial duration, which counseled against striking defendant's 1997 conviction as being too remote for Three Strikes law purposes.

The trial court denied the *Romero* motion, finding defendant had engaged in a "continuous course of criminal conduct" for almost 20 years since his first strike conviction. Because defendant had not enjoyed a "washout period," the court also found defendant lacked "potential for rehabilitation" and demonstrated a "great potential for recidivism." The trial court rejected defendant's argument that the assault on S.H. was a "heat of passion type crime"; to the contrary, the court believed the baseball bat attacks constituted "grave criminal conduct"

because defendant “pursued the victim on multiple occasions after the victim tried to disengage from the incident.”

Having denied the defense *Romero* motion, the trial court sentenced defendant under the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12) to 25 years to life in prison. In addition, the court added two consecutive five-year enhancements to defendant’s sentence, pursuant to what were then mandatory provisions of section 667, subd. (a)(1).

After the trial court imposed sentence, the prosecutor informed the court that S.S.’s mother requested a protective order when she spoke with defendant’s probation officer. The trial court found good cause for such an order based on the facts at trial and indicated that it would issue a formal protective order, as opposed to a “verbal no contact” order. Defense counsel did not object. Using a pre-printed Judicial Council form, the trial court issued a three-year criminal protective order directing defendant not to have any contact with S.H., S.S., or S.S.’s mother. On the form, the trial court checked boxes indicating issuance of the protective order was authorized by section 136.2, subdivision (i)(1) and section 646.9, subdivision (k).

## II. DISCUSSION

We hold the trial court’s refusal to strike defendant’s 1997 assault with a firearm conviction for purposes of the Three Strikes law did not exceed the bounds of its discretion. Defendant’s baseball bat attack on a minor in this case, when combined with his extended criminal history (including the prior strike crimes involving discharge of firearms), gave the trial court adequate reason to conclude defendant was the type of offender to whom the Three Strikes law was meant to apply. We further

hold, however, that the trial court should be given an opportunity to exercise discretion it did not have at the time of sentencing to decide whether to strike one or both of the five-year section 667, subdivision (a)(1) sentencing enhancements it imposed as part of defendant's sentence. We remand for that limited purpose, while modifying the judgment ourselves to strike the post-conviction protective order both parties agree was unauthorized.

A. *The Trial Court Was Within Its Discretion to Deny the Romero Motion*

1. *Guiding principles and standard of review*

California's Three Strikes law was designed to restrict the discretion of trial courts when punishing recidivist offenders "to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of one or more serious and/or violent felony offenses." (*People v. Sasser* (2015) 61 Cal.4th 1, 11.)

However, a "judge . . . may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed.' 'In *Romero*, [our Supreme Court] held that a trial court may strike or vacate an allegation or finding under the Three Strikes law that a defendant has previously been convicted of a serious and/or violent felony, on its own motion, "in furtherance of justice" pursuant to . . . section 1385(a).' [Citation.]" (*People v. Carmony* (2004) 33 Cal.4th 367, 373 (*Carmony*)).

When confronted with the question of whether a prior conviction should be stricken pursuant to *Romero*, a trial court must consider whether the defendant falls outside the "spirit" of the Three Strikes sentencing scheme by looking to the nature and

circumstances of the present offense of conviction; the nature and circumstances of prior serious or violent felony convictions; and the particulars of the defendant's background, character, and prospects. (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*)). The overall sentence to be imposed "is also a relevant consideration . . . [,] in fact, it is the overarching consideration because the underlying purpose of striking prior conviction allegations is the avoidance of unjust sentences." (*People v. Garcia* (1999) 20 Cal.4th 490, 500.)

The Three Strikes law "creates a strong presumption that any sentence that conforms to [its] sentencing norms is both rational and proper." (*Carmony, supra*, 33 Cal.4th at p. 378; see also *People v. Myers* (1999) 69 Cal.App.4th 305, 310 ["Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance"].) We review for abuse of discretion a trial court's decision not to dismiss a prior felony conviction allegation under section 1385. (*Carmony, supra*, at p. 374.) "Because the circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary." (*Id.* at p. 378.)



2. *There was no abuse of discretion*

The trial court did not abuse its discretion in denying defendant's *Romero* motion. The court read and considered the parties' arguments concerning defendant's age, his recent college degree, and letters from his family attesting to a positive change in his character on the one hand, and his criminal history, including the nature and circumstances of the two prior felony offenses and the current offense, on the other. Of particular concern to the trial court was the "regular pattern of criminal conduct" that followed defendant's first strike conviction in 1997. "It's one thing," the court observed, "if the defendant has a break in his criminal history before committing a third strike. Those are usually the circumstances under which judges will strike the strikes. However, in this case it appears that the defendant has had a continuous course of criminal conduct for almost twenty years from the time of his first strike to the present." The trial court's stated rationale is consistent with the goal of the Three Strikes law.<sup>6</sup> (*People v. Leng* (1999) 71 Cal.App.4th 1, 14 ["The well-recognized purpose of the three strikes law is to provide increased punishment for current offenders who have previously committed violent or serious crimes and have therefore not been rehabilitated or deterred from further criminal activity as a result of their prior imprisonment"].)

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<sup>6</sup> Defendant's opening brief suggests the court may not have understood or exercised its discretion because the trial court did not make certain comments on the record. The contention is meritless. (*People v. Myers, supra*, 69 Cal.App.4th at p. 310 ["The court is presumed to have considered all of the relevant factors in the absence of an affirmative record to the contrary"].)

Indeed, the facts here are not unlike those in *Williams*. The defendant in *Williams*, like defendant here, had a lengthy history of criminal offenses as an adult —multiple convictions or parole violations, spanning the 13 intervening years between his prior serious and/or violent felony convictions. (*Williams, supra*, 17 Cal.4th at pp. 154, 163-165.) However, as with defendant here, the arguably more serious offenses had been committed by the defendant in *Williams* some years before the current crime. Moreover, the defendant in *Williams*, perhaps akin to defendant here, had achieved some stability later in life and was still loved and supported by his family. (*Id.* at p. 163.) Our Supreme Court in *Williams*, however, held the defendant was still within the spirit of the Three Strikes law. (*Ibid.*) Specifically, the court wrote that in light of “the nature and circumstances of his present felony of driving under the influence, which he committed in 1995, and his prior conviction for the serious felony of attempted robbery and his prior conviction for the serious and violent felony of rape, both of which he suffered in 1982 . . . , Williams cannot be deemed outside the spirit of the Three Strikes law in any part, and hence may not be treated as though he had not previously been convicted of those serious . . . or violent felonies.” (*Id.* at pp. 162-163.)

The Court’s observation in *Williams* is apt here. At the time of the crime in this case, defendant had been released only relatively recently from prison for the 2008 drive-by shooting conviction. Defendant’s assertion that he was trying to be a productive member of society after being released from prison is inconsistent with his extended, repeated attacks on S.H. with a baseball bat, especially where S.H. never fought back and repeatedly tried to disengage from the confrontation. As in

*Williams*, defendant’s prior convictions indicated that he “‘had been taught, through the application of formal sanction, that [such] criminal conduct was unacceptable—but had failed or refused to learn his lesson.’” (*Williams, supra*, 17 Cal.4th at p. 163.) Defendant, in other words, had failed to add “maturity to age.” (*Ibid.*)

Because the trial court properly “‘balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law’” (*Carmony, supra*, 33 Cal.4th at p. 378, citation omitted), its determination was not an abuse of discretion.

*B. Senate Bill No. 1393 Applies Retroactively and Warrants a Remand*

At the time it sentenced defendant, the trial court had no discretion under section 667, subdivision (a) and section 1385, subdivision (b) to strike a prior serious felony conviction for purposes of sentence enhancement. However, shortly before defendant was sentenced, the Legislature passed and the Governor signed Senate Bill No. 1393 (Stats. 2018, ch. 1013, §§ 1-2), which amends those two statutory sections to allow a court to strike or dismiss a prior serious felony conviction for sentencing purposes “in the furtherance of justice.” (§ 1385, subd. (b)(1).) The amendments went into effect on January 1, 2019.

Defendant and the Attorney General agree that the amended statutes apply retroactively to defendant under the principles espoused in *In re Estrada* (1965) 63 Cal.2d 740, 744-745. The Attorney General, however, objects to remanding this case to allow the trial court to consider exercising its newly provided discretion under section 1385, arguing it would be an idle act. According to the Attorney General, the trial court’s

statements at sentencing “clearly indicated” it would not have dismissed the enhancements even if it had the discretion to do so at the time.

“[W]hen the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] Defendants are entitled to ‘sentencing decisions made in the exercise of the ‘informed discretion’ of the sentencing court,’ and a court that is unaware of its discretionary authority cannot exercise its informed discretion.’ [Citation.]” (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 [remanding in light of amendment which vested courts with discretion to strike or dismiss firearm enhancements].) A remand is not required, however, if “the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [the previously mandatory] enhancement.” (*Ibid.*)

We do not share the Attorney General’s confidence that the trial court clearly indicated it would not have stricken one or both of the prior felony enhancements if it had the discretion to do so. The trial court did not reveal its leanings on the point one way or the other at sentencing—indeed, the court limited its comments on the record to the *Romero* motion and reminded the parties it “ha[d] no authority to strike [the five-year sentencing enhancements pursuant to section 667, subdivision (a)(1)]” because “[o]nly a prosecutor can dismiss those.” Further, although the trial court noted in connection with its denial of the *Romero* motion that defendant had engaged in a nearly continuous course of criminal conduct for almost 20 years, lacked

the potential for rehabilitation, and demonstrated a great potential for recidivism, the trial court was careful to note it gave the defense motion “very serious consideration.” In the absence of a clear indication from the sentencing court (and there is none), and because the sentencing impact of striking one or more of the five-year enhancements is quite different than striking a prior “strike” conviction (which would eliminate the indeterminate aspect of defendant’s sentence), we remand to permit the trial court to decide in the first instance whether and how it wishes to exercise discretion it did not previously have.

*C. Modification of the Judgment Is Necessary*

Defendant argues,<sup>7</sup> and the Attorney General concedes, that the trial court lacked the statutory authority to issue the protective order. We accept the concession.

The trial court identified two statutes that purportedly authorized the issuance of a post-conviction protective order: section 136.2, subdivision (i)(1) and section 646.9, subdivision (k). Neither of those statutes, however, is applicable here. First,

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<sup>7</sup> Although defendant did not object at the sentencing hearing to issuance of the protective order, the error in issuing the order constitutes an unauthorized sentence that we will correct regardless. (*People v. Ponce* (2009) 173 Cal.App.4th 378, 381-382 [since protective order issued under section 136.2 was not statutorily authorized, failure to raise issue below did not result in forfeiture]; see also *People v. Robertson* (2012) 208 Cal.App.4th 965, 995-996 [striking oral no-contact protective order, even though defendant did not object, because order was not authorized by any statute].)

under the relevant version of section 136.2, subdivision (i)(1),<sup>8</sup> a trial court may issue a protective order upon a defendant's conviction of a crime "involving domestic violence as defined in Section 13700 or in Section 6211 of the Family Code, a violation of Section 261 [rape], 261.5 [unlawful sexual intercourse with a minor], or 262 [spousal rape], a violation of Section 186.22, or a crime that requires the defendant to register [as a sex offender] pursuant to subdivision (c) of the Section 290." Defendant was not convicted of any of the crimes enumerated in section 136.2, subdivision (i)(1). Nor was defendant convicted of stalking, the predicate offense for the issuance of a protective order pursuant to section 646.9, subdivision (k). We shall therefore modify the judgment to strike the imposition of the protective order. (See *People v. Ponce, supra*, 173 Cal.App.4th at pp. 381-385 [striking unauthorized criminal protective order issued pursuant to section 136.2].)

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<sup>8</sup> In September 2018, a year after the trial concluded, the Legislature added to section 136.2, subdivision (i)(1) other statutory bases for the issuance of a protective order: section 236.1, subdivision (a) (human trafficking); section 266h, subdivision (a) (pimping); and section 266i, subdivision (a) (pandering). (Stats. 2018, ch. 805, § 1.)

## DISPOSITION

The judgment is modified to strike the post-conviction protective order. The cause is remanded to provide the trial court with an opportunity to consider whether to exercise its discretion to strike one or both section 667, subdivision (a)(1) enhancements under section 1385. In all other respects, the judgment is affirmed.

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BAKER, J.

We concur:

RUBIN, P. J.

KIM, J.